Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-99

FRANK AMATO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Frank Amato, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 7, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra* (pp. A1-A7), is reported at 495 F. 2d 545.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1974, Appendix A, *infra* (p. A8). A timely petition for rehearing was denied on July 12, 1974. Appendix B, *infra* (p. A9). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a common crime against a small, local tavern constitutes a federal offense under the Hobbs Act, 18 U.S.C. §1951, and the Constitution of the United States merely because that local business obtained some of its stock in trade from a chain of suppliers that eventually involves interstate transactions.

2. Whether a conviction on a one-count indictment of conspiracy to obstruct commerce by extortion can be sustained, where eight defendants were named in the indictment, and where the trial pieced together evidence admissible as to each of the defendants named in the indictment, and where the trial judge entered judgments of acquittal as to three of the defendants, and the jury returned verdicts of not guilty as to two others, and the Court of Appeals reversed the conviction of a sixth defendant for insufficient evidence.

STATUTE INVOLVED

The Federal statutory provision involved, 18 U.S.C. §1951, is set forth in Appendix C, *infra* (pp. A10-A11).

STATEMENT OF FACTS

This is a prosecution under the statute familiarly known as the Hobbs Act, 18 U.S.C. §1951. Petitioner was indicted and tried in a single count indictment with seven other defendants for conspiring to obstruct interstate commerce by extortion. The trial was held in the United States District Court for the Southern District of Florida (Roettger, D.J.). Petitioner and two of the other seven defendants were found guilty. Petitioner was sentenced to imprisonment for a term of ten years. Of the other two convicted defendants, one received a twelve year prison sentence; the other was given a suspended sentence of seven years' imprisonment and placed on probation for five years.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed as to two of the defendants. The court (Brown, C.J.; Tuttle, Simpson, JJ.) concluded that there was insufficiency of proof of the crime charged against the co-defendant who had received the suspended sentence. Of the eight original defendants, thus, only petitioner and one other remain under judgment of guilt.[1]

[1]Of the remaining defendants, three were granted judgments of acquittal by the trial judge. (Tr. 837-38, 1235, 1272). The jury returned verdicts of not guilty as to two defendants. (Tr. 1343, 1344).

The indictment charged a conspiracy over a period of one year, commencing November 1, 1970, to extort money, goods and services from the owners of a restaurant and cocktail lounge known as "Oliver's" in North Miami, Florida. The Government's evidence concerning that period of time showed that petitioner and others were frequent patrons of "Oliver's" who, unlike most customers, were sometimes given credit. (Tr. 180, 182, 738, 739, 772). The Government argued, and the court below noted the argument, that the defendants did not ultimately pay all of these charges. Petitioner's Exhibit #1 at the trial was a composite of all the tabs or credit slips turned over to the Government; all but three had been paid and none, paid or unpaid, included the name of petitioner. (Tr. 230). There was testimony of one incident involving petitioner and others in which they received food and beverages without signing a tab and without subsequent payment of the group's bill for some $60.00. (Tr. 188, 592, 626).

There was also evidence that petitioner asked for employment at "Oliver's" as night manager (Tr. 430, 541). These requests were rejected by the owners, Frederick and Sheldon Arthur, and their mother Selma Arthur. One of the co-defendants, Fusco, also asked for and was refused employment. (Tr. 159-62). The District Court entered a judgment of acquittal as to Fusco for insufficient evidence.

These rejected requests for employment, the privilege of purchasing on credit and the very limited evidence of bills not subsequently paid are the gist of the "property" which the

Government contends the defendants obtained or sought to obtain in this case.

The only physical violence concerning petitioner concerned an incident on May 28, 1971. An altercation arose at the restaurant between the owners and Lawrence Weisburg over an $18.00 tab signed by the latter and unpaid for three weeks. (Weisburg was also charged in this indictment; the District Court subsequently granted a judgment of acquittal for lack of evidence. (Tr. 837)). In the brawl on May 28, Weisburg was severely injured by the Arthurs. (Tr. 165, 460, 684-91, 698, 700, 740-43, 946, 956). According to a stipulation between prosecution and defense, the beating inflicted upon Weisburg caused multiple rib fractures, a broken nose, a swollen left testicle and distended large and small intestinal loops, post trauma. (Tr. 1111).

Petitioner was not present when Weisburg suffered these injuries, but arrived at "Oliver's" shortly afterward. Petitioner and several others assaulted the two Arthur brothers who had injured Weisburg. Before the fighting began, petitioner declared that Weisburg was like a brother to him. (Tr. 168, 321, 409). Frederick Arthur was hospitalized for superficial injuries. (Tr. 302, 1141, 1153). This second brawl ended with the arrival of the police.

Later that evening, Selma Arthur, mother of Frederick and Sheldon, went to a neighboring cocktail lounge managed by Weisburg. (Tr. 419, 749). Petitioner was present and immediately apologized to her for what had happened and invited her to join him and others for a drink. (Tr. 419). Petitioner's brother, who was with the group, berated him for the assault on the Arthurs and said: "I'm surprised at you . . . you know Larry

Weisburg when he gets drunk." (Tr. 420). Petitioner apologized profusely to Selma Arthur. (Tr. 422).

At this point Sheldon Arthur entered with an automatic handgun in his trousers. (Tr. 424, 750). Co-defendant Brunella, whose conviction was reversed by the Court of Appeals, took the gun away from Sheldon Arthur. At Petitioner's request, the gun was given to Selma Arthur and she was asked to take Sheldon home. Sheldon testified that, as they were leaving, petitioner verbally threatened to "get" him. (Tr. 751).

In the weeks following this incident, petitioner suggested to Selma Arthur that he or Fusco be made night manager. (Tr. 173, 541). Petitioner told her that her son could not "handle a situation the way I can handle it. If I am here you won't have any more trouble." (Tr. 542). During this period, petitioner apologized again for the incident: "We are desperately sorry for what we did, we don't know how to tell you. We don't know how to apologize to you." (Tr. 426). During the same period, Sheldon and Selma Arthur testified, they received anonymous threatening telephone calls. (Tr. 523-24, 752).

After a month or two, petitioner was present in "Oliver's". A waitress testified that he said he was going to shoot Sheldon Arthur because "I don't like him. I come in here, he's not friendly to me. He doesn't talk to me." (Tr. 428).

Five months after the drunken brawl between Weisburg and the Arthurs and its sequel, another altercation occurred at "Oliver's". The evidence did not connect the two incidents, and

neither petitioner nor the other participants in the earlier brawl were present. (The only person identified in this September 28, 1971, fight, Peter Allen, (Tr. 188-89, 193, 589-90), was charged as a defendant in this indictment; the District Court ordered a judgment of acquittal on the charges against him. (Tr. 1272)). The fight on September 28 resulted in injuries to Frederick Arthur that required hospitalization and property damage to the restaurant. (Tr. 194-95, 588, 731, 877-79).

"Oliver's" was closed for about a month. Sheldon Arthur spoke to petitioner and co-defendant Lambert about reopening the restaurant. Lambert told him that it was "okay" (Tr. 762); petitioner, it was testified, warned him not to do so. (Tr. 763). The restaurant was reopened and sold by the Arthurs at a large profit (Tr. 764).

The factor that supposedly elevates this barroom brawling to a federal offense in the view of the courts below is the most ephemeral link to interstate commerce. The *entire* evidence on the relationship to commerce is in the brief testimony of two witnesses. One, the sales manager of a liquor supplier that sold goods to "Oliver's", testified that the supplier's inventory came from outside Florida. (Tr. 869). The other, an accountant for a meat company that sold meat to "Oliver's", testified that its meat came from outside Florida. (Tr. 872). Neither witness testified to the quantity of his firm's sales to "Oliver's", nor to the significance of "Oliver's" in the suppliers' business volume. The District Court charged the jury as follows:

"As to the second element of the offense charged,

namely, the showing of an effect of defendants' actions on interstate commerce, it is a question of law for the Court to determine what is or what is not interstate commerce. However, it is for you, the jury, to determine if the evidence of the witnesses that liquor and meat supplies were brought in from out of the state is to be believed, and is believed by you; if so believed by you, then the result is direct and substantial interference with or effect upon interstate commerce." (Tr. 1305).

As indicated above, the Court of Appeals for the Fifth Circuit affirmed convictions of petitioner and one other defendant, Lambert. The appellate court makes no use of the District Court's phrase of "direct and substantial interference with or effect upon interstate commerce." The Court of Appeals affirms on the ground that the evidence of the two suppliers is enough to show "an" effect on commerce.

REASONS FOR GRANTING THE WRIT

1. Whether a common crime against a small, local business constitutes a federal offense under the Hobbs Act, 18 U.S.C. §1951, and the Constitution of the United States merely because that local business obtained some of its stock in trade from a chain of suppliers that eventually involves interstate transactions.

The first question presented concerns a fundamental question of the scope of federal power under the Commerce Clause of the Constitution of the United States. The question goes to the

interpretation of a federal criminal statute which addresses the problem of "interference with commerce by threats or violence," 18 U.S.C. §1951. It has long been held that the scope of this statute, the Hobbs Act, extends to "all . . . commerce over which the United States has jurisdiction." Section 1951(b)(3). This case, along with a spate of other recent cases, poses the fundamental question of how attenuated the relationship to interstate commerce can become without overrunning the scope of the statute and violating the Constitution.

Although the statute here involved has been in force since 1934, it is only in very recent years that federal prosecutors have invoked it in petty, local criminal disputes represented by the instant case. The original statute, the Anti-racketeering Act, was overtly designed to reach predators preying on the flow of interstate commerce, or facilities of interstate commerce, often using the power of labor unions illicitly for private, personal gain.

The first reported decisions of the Courts of Appeals under the 1934 Act illustrate the kinds of abuses involved. In the earliest case, *United States v. Nick*, 122 F.2d 660 (8th Cir. 1941), cert. denied, 314 U.S. 687 (1941), labor officials extorted, or attempted to extort, large sums of money from exhibitors of motion picture films and to compel the exhibitors to purchase unwated services from a private business owned by the labor officials. A very similar extortionate scheme, prosecuted in New York, also involved systematic victimizing of producers and exhibitors of motion picture films. *United States v. Compagna*, 146 F.2d 524 (2d Cir. 1944), cert. denied, 324 U.S. 867 (1945).

And see *United States v. Bioff*, 40 F. Supp. 497 (S.D.N.Y. 1941).

Reflective of the scale of federal concern involved in the invocation of the 1934 statute was the fact that only the Attorney General and his assistants were permitted to represent the United States. E.g., Francis Biddle, Attorney General, appeared as counsel in the Second Circuit in *Compagna*. Special Assistants to the Attorney General and Assistant Attorney General Thurmond Arnold appeared in the Eighth Circuit in *Nick*.

During the first decade of the statute's existence, this Court gave its first review to the Act. Local 807 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. United States, 315 U.S. 521 (1942). This case, too, involved the use of the concerted power of labor unions. Their purpose was to compel trucking firms sending trucks into New York City to hire local drivers or to pay an amount equivalent to the wage of local drivers. This Court held that, even though the union had engaged in violent and coercive conduct, an exception in the 1934 Act for payment of wages to *bona fide* employees prevented conviction.[2]

This Court has subsequently considered this statute in three other cases. All involve issues of major labor strife. Following the decision in *Local 807*, Congress amended the 1934 Act to change the law. The amended statute, now known as the Hobbs Act, was invoked against a labor union and labor official in *Green v. United States*, 350 U.S. 415 (1956). An indictment charged the

union with extortion in seeking wages for imposed, unwanted, superfluous and fictitious services of "swampers" in the operation of equipment for maintenance work on a levee. The District Court had held that the indictment failed to set forth an offense. This Court, following the will of Congress in the 1946 amendment, reversed.

Four years after *Green*, this Court reviewed the conviction of a union officer for extorting some $31,000.00 by threatening labor strife against the supplier of the concrete that was being used in the construction of a steel processing plant. This Court reversed the conviction because the trial court had permitted introduction of evidence of involvement of interstate commerce that had not been charged in the indictment. The indictment had been limited to the fact that the concrete supplier obtained sand from interstate sources. Proof had been adduced that the steel processing plant under construction would eventually ship some of its output in interstate commerce. This Court found admission of that evidence reversible error. *Stirone v. United States*, 361 U.S. 212 (1960).

Just last year, this Court had its fourth and its last case under the Hobbs Act. Like those previously decided, it involved labor strife. The Government charged that violence by members and officers of a union during a strike against a utility company was criminal under the Act. This Court concluded that the statute does not proscribe use of force to try to achieve legitimate collective bargaining demands. *Emmons v. United States*, 410 U.S. 396 (1973).

Another set of cases prosecuted under the Hobbs Act deal with misuse of political power for private gain through extortionate schemes. One of these is from the 1940's, but the bulk have been brought to the point of a reported appeal in the late 1960's and 1970's. *United States v. Ladner*, 168 F.2d 771 (5th Cir. 1948), cert. denied, 335 U.S. 827 (1948); *United States v. Pranno*, 385 F.2d 387 (7th Cir. 1967); *United States v. Battaglia*, 394 F.2d 304 (7th Cir. 1968); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972); *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972); *United States v. Enmalfarb*, 484 F.2d 787 (7th Cir. 1973). None of the cases in this line has ever been reviewed by this Court.

There is a third line of cases under the Hobbs Act. The prosecution against petitioner is the latest example of the intrusion by the federal courts into controversies that have the thinnest relationship to interstate commerce. The first case in this line was decided as recently as 1967 in the Court of Appeals for the Ninth Circuit. The frequency of such prosecutions in the 1970's indicates that, unless this Court acts to review the matter, there will be a dramatic increase in the federal criminal jurisdiction and a wholesale incursion of federal process into areas cognizable under State law.

The 1967 Ninth Circuit case involved prosecution of the owner of a vending machine business who was charged with coercing a bowling alley operator into removing a competitor's pool table and installing one provided by the defendant. The Court of Appeals found the commerce requirement met in the

fact that the removed table had come from out of state originally. *United States v. Battaglia*, 383 F.2d 303 (9th Cir. 1967).

Two years later, a federal prosecution based upon coercion of a refuse remover to give up efforts to set up a business in a Connecticut city was upheld by the Second Circuit. *United States v. Tropiano, 418 F.2d 1069 [2d Cir. 1969], cert. denied, 397 U.S. 1021 [1970].*

In the past three and a half years, there have been ten cases reported in the Courts of Appeals, including petitioner's, on increasingly petty and local offenses. *United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir. 1971), cert. denied, 404 U.S. 958 (1971); *United States v. DeMasi*, 445 F.2d 251 (2d Cir. 1971); *United States v. Augello*, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972); *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), cert. denied, 410 U.S. 969 (1973); *United States v. Nadaline*, 471 F.2d 340 (5th Cir. 1973); *United States v. Nakaladski*, 481 F.2d 289 (5th Cir. 1973); *United States v. DeMet*, 486 F.2d 816 (7th Cir. 1973); *United States v. Pacente*, 490 F.2d 661 (7th Cir. 1973); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973); *United States v. Amato*, 495 F.2d 545 (5th Cir. 1974).

Caldarazzo involved a common robbery. The victim was a jewelry salesman, who lost his samples. Since the salesman's territory covered several States, the Court of Appeals concluded that the robbery constituted a federal offense under the Hobbs Act.

DeMasi, like the present case, involved disturbance of restaurant and bar. The prosecution charged defendants with acts of violence that led to the closing of the club. As in the present case, the Court of Appeals found that interference with interstate commerce was demonstrated by the fact that the club's meat and liquor had originated out of state.

Augello is a startling case. The owner of a hamburger stand, known as Happy Burger's, was coerced into paying $100.00 for "protection." The Court of Appeals for the Second Circuit found that this depletion of the business's resources sufficiently affected interstate commerce to justify federal prosecution.

The defendant in *Mitchell*, a job developer for the Congress of Racial Equality, was convicted for coercing the owner of a retail outlet for television and phonographs to hire a black manager. The supposed interstate commerce nexus was the original source of the inventory of the store.

Nadaline arises from competition between businesses, carried on with force and coercion. The defendants were convicted for attempting to force a competitor to discharge a salesman who had left the defendants' employ to join the competitor.

Nakaladski involved loan sharking. The debtor owned a grocery store. Some of the store's inventory had originated out of state.

DeMet concerned police officers who received $100 in cash and liquor worth $300 through extortion against a cocktail

lounge owner.

Pacente and *Gill* both involve policemen extorting small sums of money from a tavern and liquor store.

In upholding convictions in these cases, the Courts of Appeals have stated some remarkable principles of federal jurisdiction. Early in the life of this statute, a District Court concluded that federal power could be asserted only if the prosecution involved substantial and material interference with interstate commerce. *United States v. Gramlich*, 19 F. Supp. 422 (S.D. Ill. 1937). In one of the few labor union extortion cases not reviewed by this Court, the Eighth Circuit said that exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for material, equipment and supplies, or who are engaged in constructing facilities for interstate commerce, is covered by the Hobbs Act. *United States v. Hulahan*, 214 F.2d 441 (8th Cir. 1954), cert. denied, 348 U.S. 856 (1954).

The *Stirone* prosecution stretched the principles previously recognized. The victim of the extortionate scheme was a concrete supplier for a steel processing plant. Going beyond the coercion focused on the concrete firm's dependence upon sand moving in interstate commerce, the prosecution admitted evidence that the steel plant would make products that would be sold across state lines. The steel plant was not a facility of interstate commerce. Judge Hastie dissented from the Court of Appeals' affirmance. *United States v. Stirone*, 262 F.2d 571, 578 (3d Cir. 1959).

> "Indeed, I understand the authoritative rule to be that where the conduct in question is an interference with a distinctly local business, there must be a substantial resultant demonstrable effect, the very antithesis of a speculative effect, upon interstate commerce to justify federal intervention under the commerce power." Id. at 579. As indicated earlier, this Court reversed the conviction on other grounds.

As the federal prosecutions in the late 1960's and 1970's have moved deeper and deeper into distinctly local affairs, the rationales used by the Court of Appeals have steadily attenuated the required connection with interstate commerce. In *United States v. Tropiano, supra*, the Second Circuit stated that the extortion or threats need affect interstate commerce only in a minimal degree. 481 F.2d at 1076. The same court carried this even fuarther in *Augello v. United States, supra:* " . . . it is enough that the extortion . . . affects commerce, though its effect be merely potential or subtle." 451 F.2d at 1169-70.

The Fifth Circuit, in its recent run of cases, has adopted the Second Circuit's principle that the impact of extortion needs to affect interstate commerce only in a minimal degree. *United States v. Nadaline, supra.*

The standard in the Seventh Circuit is the most extreme. According to that court, extortionate conduct "having an arguably *de minimis* effect" on interstate commerce may be punished. *United States v. Demet, supra; United States v. Gill, supra.* The adoption of this broad principle of federal power was

protested by Chief Judge Swygert as early as 1968. *United States v. Amabile*, 395 F.2d 47, 54 (7th Cir. 1968). He reiterated his concern about the unlimited reach of the court's doctrine in *United States v. DeMet*, 486 F.2d 816, 822 (7th Cir. 1973). Later, in *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), Chief Judge Swygert wrote: "With reluctance, the author accepts Judge Fairchild's opinion in DeMet as the law of the circuit." *Id.*, 236 n. 1.

This Court has never considered the drift protested by Judges Hastie and Swygert into a virtually unlimited theory of federal power to prosecute for crimes against property. The cases disclose that such drift is occurring and with increasing velocity. Meanwhile, the Courts of Appeals are trivializing the standards of effect upon interstate commerce in doctrinal terms that can only accelerate the process already visible. In a period when thoughtful people are seriously concerned about the burdens upon the federal system, the events that are occuring under the Hobbs Act certainly warrant the attention of this Court.

2. Whether a conviction on a one-count indictment of conspiracy to obstruct commerce by extortion can be sustained, where eight defendants were named in the indictment, and where the trial pieced together evidence admissible as to each separate member of those named in the indictment, and where the trial judge entered judgments of acquittal as to three of the defendants, and the jury returned verdicts of not guilty as to two others, and the Court of Appeals reversed the conviction of a sixth defendant for insufficient evidence.

The prosecution in this case is composed of a motley collection of bits and pieces of evidence that the Government strung together on a conspiracy theory. To spread the net widely, the indictment named eight individuals as alleged conspirators to obstruct interstate commerce. This combination allowed the introduction of a melange of testimony that related to one or several of the defendants, but not to all.

After trial and appeal, only two of the eight indicted defendants stand convicted. The evil in this procedure is plain. Neither of the convicted defendants had any part to play in the violence that caused "Oliver's" to close temporarily. That incident on September 28, 1971, involved on of the indicted defendants. That defendant is no longer in the case. Yet the temporary closing of "Oliver's" is the critical nexus to even the attentuated effect upon interstate commerce that the Court of Appeals found sufficient to ground federal jurisdiction. Moreover, the violence in that September incident, in which petitioner had no part, was the greatest in this case. The earlier drunken brawl which precipitated petitioner's actions on behalf of his beaten friend was not nearly so severe.

Whether the patchwork prosecution that the Government tried unsuccessfully to put together as to eight defendants is too threadbare to contain any of the remaining defendants is a question of basic fairness of federal criminal process that is deserving of review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted by this Court.

Respectfully submitted,

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